IN THE COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. 2023 CR 00407**
Plaintiff	*	**JUDGE FERENC**
-VS-	*	
CHAD C. DOERMAN	*	**DEFENDANT'S MOTION #9- MOTION TO SUPPRESS AND IN LIMINE**
Defendant	*	

Mr. Doerman moves to suppress statements made to, or in the presence of law enforcement officers or their agents, for the reasons set out below. Alternatively, he moves *in limine* to prevent the admission of said evidence at his trial.

WHEREFORE, Mr. Doerman moves for said relief, that he be permitted to file supplemental argument following the hearing on this matter, as well as such further relief to which he is entitled.

Respectfully submitted,

Gregory W. Meyers (14887)
Asst. State Public Defender
250 East Broad Street – Suite 1400
Columbus, Ohio 43215
614-466-5394
614-728-3670 (F)
gregory.meyers@opd.ohio.gov
&
W. Stephen Haynes (23215)
Clermont County Public Defender's Office
302 E. Main St.
Batavia, OH 45103
513-732-7223
513-732-5382(F)
shaynes@clermontcountyohio.gov

COUNSEL FOR CHAD C. DOERMAN

cc: Judge
Attorney book copy to PA

MEMORANDUM IN SUPPORT

I. The Interrogation

The State divided the video recording of the interrogation of Mr. Doerman into two parts. The first video covers the first 1:59:12 of the interrogation ("Part 1"). The second video covers the next 1:11:09 of the interrogation ("Part 2").

Detectives immediately detained Mr. Doerman following the events underlying the charges in this case. The interrogation begins with Mr. Doerman in cuffs in an interview room at the Clermont County Sheriff's Office.

In Part I, Mr. Doerman sits in the interview room for the first thirty-nine (39) minutes before Detectives Ross and Ring enter the room. In Part 1 at 00:39:52, Detective Ross reads Mr. Doerman the *Miranda* warning. [Part 1, 00:39:52-00:40:00]. Detective Ross asks if Mr. Doerman understands those rights. [Part 1, 00:40:01]. Mr. Doerman responds "yep" and nods affirmatively. Mr. Doerman is never presented with a written copy of his rights.

The Detective never asks Mr. Doerman if he wants to waive those rights; he never asks Mr. Doerman to sign a waiver of those rights; he never obtains a constitutionally valid waiver of those rights.

In Part I, at 00:45:47 (five minutes later), Mr. Doerman begins an exchange with Detective Ross where he requests a lawyer. [Part I 00:45:47- 00:47:00]

> Mr. Doerman: "*I'll wait for a lawyer.* I really don't know. Give me a couple of days and *let me talk to a lawyer* so I can get nice, good answers."
>
> Detective Ross: "I understand. Do you have a lawyer?"
>
> Mr. Doerman: "We have family lawyers."
>
> Detective Ross: "Who is that? Is there somebody I can call?"
>
> Mr. Doerman: "Keith Doerman."
>
> Detective Ross: "Is he related to you?"
>
> Mr. Doerman: "Yes."
>
> Detective Ross: "How is Keith related to you?"
>
> Mr. Doerman: "My dad."

Mr. Doerman: "Ruby (sp) Franklin. She is in the CIA."

Detective Ross: "Is she a lawyer? Is Ruby a lawyer?"

Mr. Doerman: "She is in the CIA."

Detective Ross: "I know I heard you say that but I didn't know maybe if she was a CIA attorney or... but you said your dad is a lawyer?"

Mr. Doerman: "mmm-hmmm (negative). We have a family lawyer."

Detective Ross: "Alright. But you don't know who that is?"

Mr. Doerman: "No."

Mr. Doerman tells Detective Ross that he also doesn't think he ever met him before as Ross had claimed. Ross talks about the previous encounter between them he says occurred.

Detective Ross then picks up his belongings states "I'm gonna step out for a minute. Ok? Alright? You ok? Bud, you need anything?" Mr. Doerman finally responds with one word: "step." Detective Ross then exits the room. [Part 1, 00:49:06]. Det. Ring asks Mr. Doerman: "are you sure you don't want something to eat?"

Detective Ross re-enters the room at 00:50:35 and reinitiates questioning Mr. Doerman as if he hadn't just requested an attorney.

Approximately forty-five minutes later, Mr. Doerman asks "*Where's a lawyer?*" Detective Ross replies: "Laura?" Mr. Doerman responds "*A lawyer.*" Detective Ross answers, "I don't know, you tell me." [Part 1, 01:35:59]

Detective Ross does not properly address what just happened. He does not even mention the words "attorney," "lawyer" or "counsel" much less re-advise Mr. Doerman of his rights to elicit a knowing, intelligent, and voluntary waiver of those rights.

It is the Detectives' duty as trained law enforcement officers to realize the critical importance of the moment when a suspect invokes his right to counsel. The burden was not on Mr. Doerman to understand how his demands for counsel triggered the Detectives' duty to stop the interrogation; nor was the burden on Mr. Doerman to resist the Detectives' attempts to keep him talking.

Mr. Doerman invoked his right to an attorney. He unequivocally requested to speak with a lawyer before further questioning.

The interrogation of Mr. Doerman was over three hours long. He invoked his right to counsel at least twice. Detectives ignored Mr. Doerman's request and continued to question him as if he didn't ask for an attorney.

A. Legal Analysis

There are three issues with the interrogation of Chad Doerman: (A) the initial waiver, (B) Mr. Doerman's requests for an attorney during the interrogation and (C) the coercive tactics used by the police.

In both instances, law enforcement officers obtained statements from Mr. Doerman in violation of his Fifth Amendment right against self-incrimination as well as his Sixth Amendment right to counsel as applicable under the Fourteenth Amendment and Ohio's analogous rights under its constitution. In both instances, the burden rest with the prosecution.

i. Mr. Doerman did not Voluntarily Waive his *Miranda* Rights.

At the beginning of the custodial interrogation in Part 1, Detective Ross failed to procure a constitutionally valid waiver of Mr. Doerman's rights to remain silent and to have counsel provided before he was interrogated. As a result, the prosecution may not use statements obtained through a custodial interrogation that lacked the requisite *Miranda* safeguards. *State v. Dailey*, 53 Ohio St.3d 88, 90, 559 N.E.2d 459 (1990), citing *Miranda* at 444, 86 S.Ct. 1602. Those safeguards include both advising a suspect of his constitutional rights and obtaining a valid waiver of those rights before conducting an interrogation.

Prior to a custodial interrogation, the Fifth Amendment requires that a suspect "receive *Miranda* warnings to protect against self-incrimination." *State v. Wesson*, 137 Ohio St.3d 309, 2013-Ohio-4575, ¶ 34, citing *Miranda v. Arizona*, 384 U.S. 436, 478-479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). To protect an accused's rights against self-incrimination, prior to any questioning law enforcement officers must inform an accused "that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id* at 479. As required by *Miranda*, after the accused has been read his rights, the law enforcement officer must procure a constitutionally valid waiver of those rights before the interrogation proceeds:

No effective waiver of the right to counsel during interrogation can be recognized

unless specifically made after the warnings we here delineate have been given.

* * *

This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation.... [T]he burden [to prove waiver] is rightly on [the State's] shoulders.

.... But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley v. Cochran*, 369 U.S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly *rejected the offer*. Anything less is not waiver."

Miranda at 470 and 475 (emphasis added).

If a defendant challenges the validity of the waiver, the state bears the burden of demonstrating, by a preponderance of the evidence, that the waiver was knowingly, intelligently, and voluntarily made. *Wesson* at ¶ 34, citing *Miranda* at 475, 86 S.Ct. 1602; *Colorado v. Connelly*, 479 U.S. 157, 168-169, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986); see also *State v. Reynolds*, 2017-Ohio-1478, 89 N.E.3d 235 ¶ 64 (6th Dist.), citing *State v. Gumm*, 73 Ohio St.3d 413, 429, 653 N.E.2d 253 (1995).

Here, Mr. Doerman's ambiguous, "yep" response to Detective Ross' inquiry regarding Mr. Doerman's comprehension of his *Miranda* rights does not amount to either an overt or an implied constitutionally valid waiver.

There is no overt waiver. The only question is whether there was an implied waiver. Mr. Doerman argues "No."

To establish an implied waiver, the State must show that "a *Miranda* warning was given and that it was understood by the accused" and the "accused's uncoerced statements established an implied waiver of the right to remain silent." *Berghuis v. Thompkins*, 560 U.S. 370, 384, 130 S.Ct. 2250, 176 L. Ed. 2d 1098 (2010); *State v. Martin*, 151 Ohio St.3d 470, 2017-Ohio-7556, ¶ 100-101, 90 N.E.3d 857; see also *State v. Taste*, 2021-Ohio-3286 (Twelfth Appellate District, Madison County). Thus, in Mr. Doerman's case the State carries the burden to prove that: (1) Detective Ross properly advised Mr. Doerman of his *Miranda* rights; (2) Mr. Doerman understood those rights; and (3) Mr. Doerman's statements were uncoerced.

There is not sufficient evidence that Mr. Doerman understood his rights, much less evidence that he impliedly waived his rights, after he was confined in a small interrogation room, shortly after having guns drawn on him when he was forcibly placed in custody, and was then confronted by first one and then two, senior detectives who joined forces to exploit Mr. Doerman's ignorance of the law, obvious confusion and mental issues to extract constitutionally - tainted statements from him.

This situation is distinguishable from those where implied waivers have been found such as *State v. Mott*, 2023-Ohio-2268, a recent 12th District case. Here, unlike Mr. Mott, Mr. Doerman did not say that he agreed to talk with the Detectives. Instead, after a very fast recitation of the *Miranda* rights, he simply grunted a monosyllabic affirmation to Det. Ross's query of whether he understood them and then Ross began questioning him. *St. v. Mott*, supra, at ¶42. Also, unlike Mott, Doerman did stop the interview, more than once, to request an attorney.[1] He also was not advised multiple times of his rights as Mott was, nor provided a *Miranda* rights card, much less sign it, thus acknowledging that he "had been 'advised of all my rights as contained on this card and I understand all of them *and I wish to talk to you without a lawyer present*" (emphasis added) as Mott did. Doerman also did not affirm that "he was 'comfortable and aware of what was going on' while he was being interviewed" as Mott did. *Mott*, supra, at ¶43. To the contrary, Doerman appeared confused and distraught. He was in obvious distress and clearly, not right mentally.

[1] Those requests were ignored. The fact that Mr. Doerman answered questions after that is not evidence of waiver. To the contrary, it is "the product of the inherently compelling pressures and not the purely voluntary choice of the suspect." *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) and the reason behind the prophylactic, bright-line rule of *Edwards v. Arizona,* 451 U.S. 477, 485–485, 101 S.Ct. 1880 (1981), as discussed in Part B herein.

The State will therefore not meet its burden to establish that Mr. Doerman implicitly waived his right to remain silent and right to an attorney.

Accordingly, this Court should suppress all statements obtained from Mr. Doerman.

ii. Mr. Doerman Invoked his Right to Counsel

When a suspect in custody expresses "his desire to deal with the police only through counsel," the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him." *State v. Voss*, 12th Dist. Warren No. CA2006–11–132, 2008–Ohio–3889, ¶ 65, citing *Edwards v. Arizona*, supra; see, also, *State v. O'Leary*, 12th Dist. Butler No. CA2013–01–009, 2013–Ohio–5670, ¶ 23. To invoke the right to have an attorney present during interrogation, a suspect must unambiguously request counsel such that a reasonable officer in the circumstances could understand the statement to be a request for an attorney. *Voss* at ¶ 66, quoting *Davis v. United States*, 512 U.S. 452, 459, 101 S.Ct. 2350 (1994). However, if the statement is not clear that the person is requesting an attorney, then the officers are not required to stop questioning the suspect. *Id.* Statements such as "I think I need a lawyer" have been found not to be an unambiguous and unequivocal request for an attorney. See, e.g., *Voss* at ¶ 69; *State v. Henness*, 79 Ohio St.3d 53, 63 (1997).

Here, Mr. Doerman very clearly requested a lawyer, "***I'll wait for a lawyer***. I really don't know. Give me a couple of days and ***let me talk to a lawyer*** so I can get nice, good answers." [Part I 00:45:47- 00:47:00] Detective Ross responded by saying "***I understand. Do you have a lawyer?***"

Ross had no problem recognizing the clear and unambiguous exercise of Mr. Doerman's right to a lawyer. Whether or not Mr. Doerman had a lawyer is wholly irrelevant to Ross's duty immediately to cease questioning. If law enforcement had the right to ask the question Ross asked, it would lead to the absurd result that the *Miranda* right to counsel exists only when the suspect can name a lawyer – a game of 'gotcha' police would rarely lose. Any conversation following Mr. Doerman's invocation of his right to counsel is tainted.

In *Edwards v. Arizona,* the Supreme Court of the United States held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U.S. 477, 484-485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The Court's reasoning behind its judicially

prescribed prophylactic protection is that "once a suspect indicates that he is not capable of undergoing custodial questioning without advice of counsel, any subsequent waiver that has come at the authorities' behest, and not at the suspect' s own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect." *Arizona v. Roberson,* supra.

In most cases involving an alleged invocation of the right to counsel, the issue is whether the invocation was ambiguous. In those situations, "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Davis v. United States*, 512 U.S. 452, 462, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶ 18. The Supreme Court of Ohio held that "[i]f the suspect says something that may or may not be an invocation of the right, police may continue to question him; they need not treat the ambiguous statement as an invocation or try to clear up the ambiguity." *Brown* at 421.

Ohio courts have found the following requests to be ambiguous: "I think I need a lawyer." *State v. Henness*, 79 Ohio St.3d 53, 63, 679 N.E.2d 686 (1997). "Maybe I want a lawyer, maybe I should talk to a lawyer." *State v. Salinas*, 11th Dist. Lake No. 96–L–146, 124 Ohio App.3d 379, 384, 706 N.E.2d 381 (1997). "I think that I would like an attorney." *State v. Taylor*, 9th Dist. Medina No. 2783–M, 1999 WL 61619 (Feb. 9, 1999). "I think I might need to talk to a lawyer." *State v. Hanson*, 2nd Dist. Montgomery No. 15405, 1996 WL 535297 (Sept. 13, 1996). "Where's my lawyer?" *State v. Williams*, 10th Dist. Franklin No. 03AP–4, 2003–Ohio–7160. "Well, can I have a lawyer present?" *State v. Foster*, 11th Dist. Trumbull No.2000–T–0333, 2001–Ohio–8806. "Well, can I talk to my lawyer then if there is something wrong like that?" *State v. Knight*, 2nd Dist. No. 04–CA–35, 2008–Ohio–4926. "[C]an I have an attorney?" *State v. Raber*, 189 Ohio App.3d 396, 2010–0, 938 N.E.2d 106 Ohio 4066,189 Ohio App.3d 396, 938 N.E.2d 1060 (9th Dist.). In each of these situations, the officers were permitted to continue questioning.

However, Mr. Doerman's request for counsel was unambiguous. He stated: "I'll wait for a lawyer." And "let me talk to a lawyer." [Part I 00:45:47- 00:47:00]. And thus, unlike the above cases, Detectives Ross and Ring should have then stopped the interrogation. See *Voss*, 2008–Ohio–3889, ¶ 65 citing *Edwards*, 451 U.S. 477, 485, ("When a suspect in custody expresses 'his desire

to deal with the police only through counsel,' the suspect 'is not subject to further interrogation by the authorities until counsel has been made available to him.'").

Moreover, forty-five minutes later, Mr. Doerman reaffirmed his desire for counsel, asking "Where's the lawyer?" Ross however, makes clear again that he will not honor Doerman's request and that questioning will proceed regardless, taunting Mr. Doerman with his response: "I don't know. You tell me."

Realizing there has been a request for counsel shortly after the interrogation began, Detective Ross, rather than addressing the issue as required, ignores it. Detective Ross leaves the room briefly, and when he returns he does not address Mr. Doerman's request, instead reinitiating questioning as if the request had not been made.

The Court should therefore, at a minimum, suppress any statements contained after Mr. Doerman's request for an attorney beginning in Part 1 of the interrogation – an argument advanced here in the alternative to Mr. Doerman's argument that this Court should suppress the entire interrogation because the Detectives violated Mr. Doerman's constitutional rights from the outset.

iii. <u>Coercive Tactics – Voluntariness</u>

Clearly unconscionable police actions such as denying water, sleep, "beating out" a confession, threatening to take away a suspect's children if they did not confess, etc., have been found to be grounds for suppression as involuntary confessions. Such overtly illegal conduct is not involved here. Counsel also understands that *Miranda's* safeguards were designed to combat the inherent coerciveness of custodial interrogation.

However, the individual circumstances of a suspect can make some, perhaps less obviously coercive conduct cross the line and the resulting confession involuntary. See, e.g., Katz, *Ohio Arrest, Search and Seizure*, (2023) §21:3, pp 811-815. The Court, in assessing the voluntariness of a confession, should look at the totality of the circumstances, including the characteristics of the individual suspect. See, e.g., *Ashcraft v. State of Tenn.*, 322 U.S. 143, 154, 64 S. Ct. 921, 88 L. Ed. 1192 (1944) and *Chambers v. State of Florida*, 309 U.S. 227, 239, 60 S. Ct. 472, 84 L. Ed. 716 (1940).

It is submitted that the totality of the circumstances here, including Mr. Doerman's mental condition, show that the Detectives' actions overcame his will and his admissions were therefore, involuntary.

II. Mr. Doerman's Police-Recorded Statements

Mr. Doerman was arrested and interrogated by Clermont County Sheriff's Office (CCSO) detectives on June 15, 2023, hours after the shootings. Following his interrogation, he was booked into the Clermont County Jail.[2] Soon after entering the jail, he was seen by various health care providers including nurse(s) and a mental health liaison/social worker, Renae Butcher, who questioned him and with whom he communicated, ostensibly for medical (including mental health) purposes. CCSO officer(s) actively made themselves present by entering Mr. Doerman's jail cell with his health care providers for some of these privileged communications and recorded them.

On June 16, 2023 at 9:45 a.m. a CCSO officer (Kevin Lindsay) recorded Mr. Doerman going to Clermont County Municipal Court for his initial appearance. At court, he was interviewed by Assistant Public Defender Owen Kelm, who found him eligible for representation by the Public Defender's Office, discussed the charges, advised and then represented Mr. Doerman that morning before Judge Nagel. Attorney Kelm's interactions with Mr. Doerman in a small room adjacent to the courtroom were not conducted in private. They were conducted in the presence of five or six deputies, and video recorded by the body-worn camera on one of the deputies who turned the audio off during attorney Kelm's meeting with Mr. Doerman.

Later that day, a CCSO officer (Melissa Schmees) video recorded a conversation between Mr. Doerman and Renae Butcher, a social worker who counsel understands acts as a "mental health liason" in the jail, wherein she asked him questions regarding his mental state, past mental conditions and related questions. On June 17, 2023 a CCSO officer (Schmees) recorded a conversation between Mr. Doerman and a nurse (Griffin) after he requested treatment for chest pain - related issues.[3] Despite the presence of CCSO Schmees, Mr. Doerman was not readvised of his *Miranda* rights.

---

[2] He was apparently not read his *Miranda* rights other than at the beginning of the interrogation by CCSO detectives, the violation of which is the subject of §I supra.

[3] Counsel has recently received notice of other video recordings of Mr. Doerman made by CCSO officers. Those have not yet been reviewed at the time of this motion's filing. Counsel understands that many do not involve anyone questioning Doerman but that some do, mostly involving issues regarding his mental health. If the State intends to introduce those as evidence, they also should be suppressed for the reasons set out in Part II herein.

Mr. Doerman submits that it violates his Fourteenth Amendment right to Due Process, Fourth Amendment right to privacy, Sixth Amendment right to counsel and Fifth Amendment right against self-incrimination, as well as his analogous rights under the Ohio Constitution in Art. I, §§10 and 16, for law enforcement officers to willfully insert themselves into a position to overhear what, otherwise, would be a confidential, privileged conversation for medical treatment purposes, when the patient/suspect is in custody. Said actions also may violate Ohio and Federal statutory provisions and thereby, although not independent grounds for suppression, support the constitutional claims herein as well as exclusion *in limine*.

A. *Miranda* Violation

Mr. Doerman was clearly in custody at the time. To the extent that said medical providers were acting as agents of the police or if any such statements (or those made otherwise while in custody) of Mr. Doerman were obtained as a result of questions by law enforcement or their agents, the acquisition of said statements was in violation of *Miranda* and its progeny.

Renae Butcher and Nurse Griffin were "actively involved in the interview[s]" and apparently, acquiesced to law enforcement being present and to the recording[4] of what should have been confidential, private conversations about Mr. Doerman's health care and medical/mental health conditions. See, e.g., *State v. Graham*, 2nd Dist. Montgomery No. 29427, 2022-Ohio-2600, at ¶22. The circumstances in this case are even more egregious than those in *Graham* (where the social worker was "tag teaming" in an interrogation with police) as here, the social worker and nurse were conducting the entire interviews, allowing themselves to be used as inquisitors for the police. The information gleaned from these interrogations are highly relevant and potentially incriminating to the charges; Mr. Doerman's mental state is of paramount importance.

Also, it is submitted that the police actions in intervening in what should have been private, confidential discussions with Mr. Doerman's medical providers, amounted to "the functional equivalent" of interrogation in that said actions were reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d

[4] If Ms. Butcher or Griffin did not so consent, the recordings would appear to violate Ohio's "wiretapping" prohibitions, contained in R.C. §2933.51, et. al. However, counsel expects the evidence to show that they did so consent and therefore will not pursue that issue further unless the evidence shows otherwise.

297 (1980).

Justice Stewart for the *Innis* majority acknowledged that "techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation." *Rhode Island v. Innis*, supra. Justice Stewart went on to state:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, supra, at 446 U.S. 300–02.

In a footnote at the end of the above quotation, Justice Stewart added that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, supra, at 446 U.S. 302, FN 8. It is submitted that the police should have known that Mr. Doerman would be particularly susceptible to the tactics used to acquire incriminating information from him. This is established by the very fact that the Correctional Officers detaining Mr. Doerman had him interviewed by Renea Butcher precisely because they perceived mental health issues that resulted in Mr. Doerman being put in a suicide suit and under suicide watch during for some days after his incarceration.

In the event the police acts involved here are not found to have amounted to the functional equivalent of interrogation requiring *Miranda* warnings under *Rhode Island v. Innis*, it is submitted that they should be found to do so under the Ohio Constitution's right against self-incrimination in Article I, §10.

B. Police Coercion

The police, by inserting themselves into what should have been private, confidential discussions between Mr. Doerman and his health care providers, coerced Mr. Doerman into submitting to their presence. Essentially, the CCSO forced Mr. Doerman into a choice between receiving no health care or allowing police to be present.

"An interrogator's use of 'an inherently coercive tactic ...' triggers the due-process analysis of the totality of the circumstances. *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶93, quoting *State v. Clark*, 38 Ohio St.3d 252, 261, 527 U.E.2d 844 (1988). "Those circumstances include 'the age, *mentality*, and prior criminal experience of the accused: the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Myers*, 154 Ohio St.3d 405, 2018-Ohio-1903, 114 N.E.3d 1138, ¶77 (emphasis added).

In this case, the totality of the circumstances include:

- Chad Doerman was in jail. He had no power, no agency in the situation; no one in his position would reasonably think otherwise.
- At least one CCSO officer threatened him prior to this. Det. Schubert said, outside the cruiser where Mr. Doerman was sitting, loud enough to be heard, *"Is that the Motherfucker?"* "Yeah." *"Shut the door so I don't fucking kill him."*
- CCSO detectives had previously ignored his requests for counsel.
- Detectives used coercive tactics during the interrogation of June 15th, including Detective Ross comparing him to a monster.
- His mental state was such that he could not make a knowing, intelligent or voluntary consent to police being present – had he been asked. He was in no condition to object to their presence.
- He was not informed of the recordings and did not know police were recording the conversations.

The outrageous police conduct[5] herein should not be countenanced. The coercive effect of said conduct on Mr. Doerman and any "consent" to police hearing and recording his discussions with his medical providers should result in suppression of said statements.

[5] "An accused may put the conduct of the police or their agent into issue by arguing that such conduct was so outrageous as to violate due process." *State v. Doran* (1983), 5 Ohio St.3d 187, 192, fn. 4, 449 N.E.2d 1295, citing *Rochin v. California* (1952), 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183.

C. Right to Counsel Violation

Mr. Doerman was represented by counsel at the time the video recorded conversations with his healthcare providers occurred. Formal judicial proceedings had been initiated.[6] Mr. Doerman's rights to counsel under the Ohio Constitution's Article I, §10 and the United States Constitution's Sixth Amendment were violated thereby.

In *Massiah v. U.S.*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), the United States Supreme Court held that the surreptitious interrogation[7] of Massiah following an indictment to have violated the absolute right of an accused to have the guiding hand of counsel, absent waiver, at every stage of a criminal proceeding. The doctrine was relied and expanded on in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), the "Christian burial speech" case, to develop "a body of rights under the Sixth Amendment which, when applicable, are more comprehensive than Miranda rights." Katz, *Ohio Arrest, Search & Seizure* (2023) § 25:1.

The *Brewer* Court avoided the *Miranda* issue and whether the statements of the detective about the child victim's parents, Christmas, finding the dead little girl's body, etc., which triggered Williams' confession and taking the police to the body, were interrogation (*Rhode Island v. Innis,* supra, had not yet been decided). Instead the Court found that Williams' Sixth Amendment right to counsel had been violated, finding that the detective deliberately elicited the information from Williams while he was secluded from his lawyers, possibly more successfully than if he had explicitly questioned him. The Court also held that there was no evidence to support the state's claim that by responding to the burial speech Williams had intentionally relinquished or abandoned the right to counsel.

The CCSO deputies' actions herein likewise violated Mr. Doerman's rights to counsel, both under the Sixth Amendment as well as Ohio's Constitution.

CCSO officers have continued to video-record Mr. Doerman throughout his

---

[6] Charges were filed with the Municipal Court Clerk the night of June 15, 2023 and Mr. Doerman was arraigned before Judge Nagel in Municipal Court the next morning. Before that hearing, he was interviewed, advised and found eligible for representation by the Clermont County Public Defender's Office and then represented in court by Assistant Public Defender, Owen Kelm.

[7] Notably, the interrogation was by a co-defendant cooperating with law enforcement, not the police.

incarceration. Some of these interactions have elicited statements from Mr. Doerman that may be incriminating. Deputies were also present when attorney Kelm interviewed and advised Mr., Doerman in lockup at Municipal Court and video-recorded the conversation, although the audio was off. Such conduct shows a disregard for the right to counsel as well as Mr. Doerman's rights.

> " *'Implicit within the meaning of [the constitutional right to counsel] is the right of a criminal defendant to consult privately with his attorney.'* " (Alterations in original.) *State v. Osie*, 140 Ohio St.3d 131, 2014-Ohio-2966, 16 N.E.3d 588, ¶ 131, quoting *State v. Milligan*, 40 Ohio St.3d 341, 342, 533 N.E.2d 724 (1988). But " '[e]ven where there is an intentional intrusion by the government into the attorney–client relationship, prejudice to the defendant must be shown before any remedy is granted.' " *Osie* at ¶ 144, quoting *United States v. Steele*, 727 F.2d 580, 586 (6th Cir. 1984).
>
> To determine prejudice, a court must look to the factors identified in *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977): (1) whether the government deliberately intruded in order to obtain confidential and privileged information, (2) whether the government obtained directly or indirectly any evidence which was or could be used at trial as a result of the intrusion, (3) whether any information obtained was or could be used in any manner detrimental to the defendant and (4) whether details about trial preparation were learned by the government. *Osie* at ¶ 144, citing *Milligan* at 344, 533 N.E.2d 724.
>
> Here, none of those four factors are present. *We find, however, that it was an unconscionable violation of Newberry's constitutional rights.* There is not, however, anything in the record that suggests the government obtained information that it used or could have used at trial or in another way detrimental to Newberry. Finally, there is nothing in the record suggesting that the government learned any details about defense trial preparation from the act.

State v. Newberry, 2023-Ohio-3623, ¶¶ 158-160 (emphasis added).

D. <u>R.C. §2317.02 & HIPAA (42 U.S.C.A. § 1320d et. seq.) Violation</u>

As set out above, CCSO officers were present when Mr. Doerman was ostensibly being evaluated for medical purposes by Renae Butcher and the nurse; Mr. Doerman made incriminating statements. Said police presence during the communications between Mr. Doerman and his medical providers violated R.C. §2317.02 and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Both apply to oral (as well as written and electronic) communications. See, 45 C.F.R. §160.103 and *State v. Stavish*, 868 N.W.2d 670 (Minn. 2015).

Mr. Doerman did not validly waive said privileges (or his right to remain silent or to counsel), especially given his state of mind at the time. The State's failure to comply with R.C. §2317.02 also violated his rights to Due Process under the 14th Amendment to the United States Constitution. Even assuming *arguendo* that the medical-privilege rights established in R.C. §2317.02 do not emanate directly from a constitutional provision, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause." *Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (although *Evitts* dealt with federal habeas corpus issues, this principle applies with equal force here).

E. Violation of Mr. Doerman's Right to Privacy

The incriminating statements Mr. Doerman made while talking with his medical providers were obtained by the police in violation of Mr. Doerman's Right to Privacy under the Fourth Amendment of the U.S. Constitution and Art. I, §14 of the Ohio Constitution.

> The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV; *State v. Huerta*, 223 Ariz. 424, ¶ 5, 224 P.3d 240, 242 (App. 2010). A "search" under the Fourth Amendment occurs when an individual's reasonable expectation of privacy is infringed. *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984); *State v. Welch*, 236 Ariz. 308, ¶ 8, 340 P.3d 387, 390 (App. 2014). We have a two-part test for determining whether a reasonable expectation of privacy exists. *See Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring). First, an individual must "have exhibited an actual (subjective) expectation of privacy," and, second, the expectation must "be one that society is prepared to recognize as 'reasonable.' " *Id.*; *accord State v. Adams*, 197 Ariz. 569, ¶¶ 17, 20, 5 P.3d 903, 906–07 (App. 2000) (describing first question as subjective and second as objective).
>
> *State v. Peltz*, 242 Ariz. 23, 30, 391 P.3d 1215, 1222 (Ct. App. 2017). See also, *United States v. Howard*, No. 1:10-CR-121-ODE, 2011 WL 1459375, at *9 (N.D. Ga. Apr. 15, 2011), citing *Rakas v. Illinois,* 439 U.S. 128, 143 n. 12, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

Generally, an inmate's privacy rights in a jail are limited. However, society has recognized the unique nature of such discussions with medical providers like those at issue herein by enacting protections in Ohio and Federal statutes as set out above which, it is submitted, supports a right to privacy in said information not being obtained by the government

by such means. See also, *State v. Clark*, 2014-Ohio-4873, 23 N.E.3d 218 (2014), recognizing a constitutional right to privacy in medical records and requiring police to comply with the Fourth Amendment's warrant requirement prior to obtaining records of alcohol or drug tests for a criminal case despite a statute creating an exception to the privileged nature of such records and authorizing disclosure of said records.

The fact that the patient is an inmate should not negate that protection.[8] Counsel found no Ohio cases with the same facts present in Mr. Doerman's situation. Although distinguishable factually, *Arizona v. Pelz*, supra, and *U.S. v. Howard*, supra, are similar, as is *Commonwealth v. McCue*, 67 Mass. 1113, 856 N.E.2d 206 (2006). Also, cases involving the violation of an inmate's attorney-client privilege are analogous to the violations here of Mr. Doerman's medical privileges. See, e.g., *State v. Lawson*, 2012-Ohio-548, (Twelfth Dist., 2012) and cases cited therein, *State v. Milligan*, 40 Ohio St.3d 341 (1988), and *State v. Wakefield*, 4th Dist. No. 422, 1980 WL 351084 (Sept. 2, 1980). As Professor Katz summarized:

> In *State v. Milligan*, (supra) the Ohio Supreme Court held that the state violated the defendant's federal and state constitutional rights to counsel when the defendant's telephone conversation with his attorney was secretly taped and presented as evidence against him at trial. The Court further held that such a violation required, at the least, a suppression remedy. *State v. Milligan*, (supra).
>
> Consequently, to determine whether charges should be dismissed in light of a violation of the defendant's attorney-client privilege, the Ohio Supreme Court adopted the test devised by the United States Supreme court in *Weatherford v. Bursey*. (*Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)) This test requires a case-by-case analysis based on the following factors: (1) whether the government deliberately intruded in order to obtain confidential and privileged information; (2) whether the government obtained directly or indirectly any evidence which was or could be used at trial as a result of the intrusion; (3) whether any information obtained was or could be used in any manner detrimental to the defendant; and (4) whether details about trial preparation were learned by the government. *State v. Milligan*, (supra).
>
> Review by the trial court is to be accomplished through an in camera inspection of the communication in order to protect its confidentiality. *State v. Milligan*, (supra). Here a tape was made. *State v. Milligan*, (supra). When the only evidence will be the testimony of the eavesdropping officer, that testimony should be taken in camera subject to transcription under seal. *State v. Milligan*, (supra). The defendant is obliged to make a prima facie showing of prejudice, but the

[8] Society having endorsed a privacy right in such consultations, Mr. Doerman should not be expected to have done more to exhibit an expectation of said right, given the circumstances.

government which has the exclusive control of the evidence of the transgression bears the burden of showing no prejudice. *State v. Milligan*, (supra).

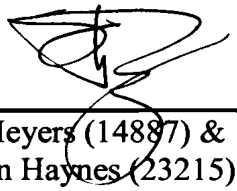
Katz, Ohio Arrest, Search & Seizure, supra, § 1:28

Mr. Doerman submits that the facts of this case support a finding that Mr. Doerman's right to privacy was violated by the police actions of inserting themselves into what should have been private, confidential discussions and recording them and therefore, his statements to his medical providers in the presence of police should be suppressed.

Accordingly, for the reasons stated above, said communications by Mr. Doerman should be suppressed or excluded *in limine* as obtained in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and the analogous portions of the Ohio Constitution in Art. I, §§ 10, 14 and 16 as well as R.C. §2317.02(B) and HIPAA.

For all of the above reasons, Mr. Doerman requests that this motion be granted and the evidence illegally obtained suppressed, or excluded *in limine*, as is appropriate.

Respectfully submitted,



Gregory Meyers (14887) &
W. Stephen Haynes (23215)

COUNSEL FOR CHAD C. DOERMAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served upon Lara Baron-Allen and Clay Tharp, Assistant Prosecutors, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio on the day this is filed.